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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1581

ANTONE OLIM, EDITH M. WILHELM, JOHN SMYTHE, WINTON LEONG, AND EDWIN SHIMODA,

Petitioners,

vs.

DELBERT KAAHANUI WAKINEKONA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Supplementary Rules and Regulations of the Corrections Division of the State of Hawaii create a reasonable expectation that a prisoner will not be transferred from the Hawaii prison system to a Mainland prison absent good cause for the transfer.

2. Whether the transfer of a prisoner from the Hawaii prison system to a Mainland prison involves a substantial change in conditions of confinement not justified by the sentence absent good cause for the transfer.

STATEMENT OF THE CASE

Respondent Wakinekona was sentenced to life imprisonment without the possibility of parole. He was confined to Hawaii State Prison (HSP). A prison program committee recommended on August 1973 that Respondent's sentence be reduced. (R. 441) A prison evaluation in January 1974 found Respondent's conduct during the preceding three years to be exemplary. (R. 441) Nevertheless, on August 13, 1976, Respondent was transferred to Folsom State Prison in California. The prison transfer papers identified Respondent as dangerous and assaultive. (J.A. 27)

Respondent, who had filed suit to restrain his transfer, pressed his claim in the United States District Court for the District of Hawaii under 42 U.S.C. section 1983 against the state officials who caused his transfer. He alleged he was transferred in violation of due process of law. He claimed that the committee that decided to transfer him was not neutral. He alleged that members of the committee were biased and prejudiced against him. (J.A. 4-5); R. 9-12, 86, 404, 444) He further alleged that the committee was composed of the same persons who had initiated the transfer proceedings, in direct violations of the Corrections Division rules and regulations. (J.A. 4-5)

The district court dismissed the amended complaint under Federal Rule of Civil Procedure 12(b)(6). It held that the transfer did not implicate a substantial liberty interest protected by due process. The Court of Appeals for the Ninth Circut reversed.

SUMMARY OF ARGUMENT

Respondent Wakinekona was transferred from Hawaii State Prison to Folsom State Prison in California. The regulatory scheme (J.A. 13-25) in effect at that time provided a detailed

procedure for making a factual finding as to what was in the best interest of the individual, the State, and the community, before transferring prisoners interstate. Corrections officials also made it a practice to provide hearings before transferring prisoners interstate. The regulatory scheme and the practice created a reasonable expectation that prisoners would not be transferred interstate without good cause. The expectation created a liberty interest that was entitled to due process protection. *Vitek v. Jones,* 455 U.S. 480, 493-94 (1980).

Aside from the regulatory scheme and practice, Respondent retained a residuum of liberty, even after his conviction and sentence. The loss of liberty caused by an interstate transfer is qualitatively different from the loss involved in an intrastate transfer. Like banishment, an interstate transfer isolates the prisoner, particularly a prisoner like Respondent. The interstate transfer of Respondent constitutes the kind of deprivation of liberty that requires procedural protections. *Vitek v. Jones,* 455 U.S. 480, 493-94 (1980).

ARGUMENT

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT MUST BE AFFIRMED BECAUSE THE INVOLUNTARY TRANSFER OF A HAWAII STATE PRISONER TO A MAINLAND PRISON IMPLICATES A LIBERTY INTEREST PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Prisoners are no longer considered slaves of the state or outcasts. *Meachum v. Fano,* 427 U.S. 215, 231 (1976) (Stevens, J., dissenting). Prisoners do not forfeit all constitutional protections on conviction and confinement. "There is no

iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell*, 418 U.S. 539, 555-556 (1974). Prisoners retain "a variety of important rights that courts must be alert to protect." *Meachum v. Fano*, 427 U.S. at 225. Among the rights a prisoner retains is a residuum liberty interest in conditions of confinement not "qualitatively different from the punishment characteristically suffered by a person convicted of a crime." *Vitek v. Jones*, 455 U.S. 480, 493 (1980). *Accord Wolff v. McDonnell*, 418 U.S. at 572 n. 19; *see generally*, Kirby, *A Case for Prisoners' Mental Health Rights – Breakthrough and Compromise*, 30 Amer. U. L. R. 765 (1980). Another is a liberty interest created by a state regulatory scheme, *Vitek v. Jones*, 455 U.S. at 487-488; *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 12 (1979); *Wolff v. McDonnell*, 418 U.S. at 571-572, *Montayne v. Haymes*, 427 U.S. 236, 241 (1976), or in the absence of formal rules by an administrative practice. *Perry v. Sinderman*, 408 U.S. 593, 599-602 (1972). Whatever the source, liberty interests are protected by due process of law. *Wolff v. McDonnell*, 418 U.S. at 557, and a basic element of due process is a right to a neutral tribunal. *Vitek v. Jones*, 455 U.S. at 496.

I. RESPONDENT HAD A REASONABLE EXPECTATION BASED ON THE STATE REGULATORY SCHEME AND PRACTICE THAT HE WOULD NOT BE TRANSFERRED TO A MAINLAND PRISON WITHOUT GOOD CAUSE.

In *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 12 (1979) this Court held that a state regulatory scheme created a sufficient expectancy of parole to entitle prisoners to some measure of constitutional protection. It emphasized that the expectancy resulted from the state's unique statutory structure

and language. In *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) this Court found that a state regulatory scheme created a sufficient expectancy of good time credits that could be forfeited only for misbehavior to entitle prisoners to some measure of constitutional protection. In *Vitek v. Jones*, 455 U.S. 480, 493-94 (1980) this Court ruled that a state statutory scheme created a sufficient expectancy that a prisoner would not be transferred to a mental hospital to entitle prisoners to some measure of constitutional protection.

Respondent had a reasonable expectation that he would not be transferred to a Mainland prison without good cause. The expectation was created by the state regulatory scheme. The expectation was created also by the state practice of providing hearings pursuant to the regulatory scheme to prisoners exposed to the risk of transfers. *See Perry v. Sinderman*, 408 U.S. at 599, 601, 602. Either expectation creates a liberty interest entitled to due process protection. Because the complaint was dismissed for failure to state a claim upon which relief may be granted, the Respondent was not given a full opportunity to develop the extent of the State's practice in providing hearings for prisoners exposed to the risk of transfers to the Mainland.

The regulatory scheme was adopted by the state director of the department of social services and approved by the state attorney general and the state governor. (J.A. 25) It was adopted under the Hawaii Administrative Procedures Act. *Haw. Rev. Stat.* c. 91-3. It has the effect of law. The scheme directly conditions the power of the Corrections Division to discipline and to reclassify prisoners. Whatever statutory powers the Hawaii legislature may have given the executive were tempered by the rules of the Corrections Division. The statutory power to place prisoners within the Hawaii corrections system, or without the Hawaii corrections system in a federal or another state's prison, is limited by this detailed regulatory scheme.

The regulatory scheme distinguishes between two kinds of hearings. The first is an adjustment hearing that results in punishment for specific rule violations. (Rule III, J.A. 13) The second is a classification hearing directed to placing prisoners in the corrections system with reference to the best interests of the individual, the state, and the community. (Rule IV, J.A. 20) An adjustment hearing is conducted by an adjustment committee appointed by the prison administrator; a classification hearing is conducted by a program committee established by the prison administrator. (J.A. 14 & 20) The composition of the program committee must be of at least three members who were not actively involved in the process by which the prisoner was brought before the committee. In addition the prison administrator shall not sit as a member of the program committee. The composition of the program committee assures the prisoner brought before it for possible reclassification some degree of neutrality.

Rule III dealing with adjustment hearings and Rule IV dealing with classification hearings provide for basic elements of due process. Prisoners are entitled to notice of and participation in the hearing, and to the findings and the recommendations of the committee, in all adjustment hearings and in *any* classification hearings involving a grevious loss. (J.A. 15-19 & 21-23) A grevious loss is defined as a serious loss to a reasonable man. (J.A. 21) The rules suggest that ordinarily a transfer from HSP on the island of Oahu to Kulani Honor Camp on the island of Hawaii does not involve a grevious loss. (J.A. 21) However, an interstate transfer does involve a grevious loss. This is evidenced by Rule V which identifes the four situations in which a prisoner is entitled to a lawyer. (J.A. 25) A prisoner is entitled to a lawyer only (1) at an adjustment hearing in which the prisoner (a) is charged with conduct that may constitute a felony or (b) is exposed to the risk of segregated punishment of more than thirty

days, or (2) at a classification hearing in which the prisoner is (a) exposed to an increased security classification for more than thirty days or (b) an *interstate* transfer. At all other adjustment hearings or classification hearings the prisoner is not allowed a lawyer, rather he is allowed a lawyer substitute. (J.A. 18 & 23)

Furthermore, the regulatory scheme requires a program committee to make factual findings and a recommendation. The findings of the committee on which the recommendation is based must be supported by the evidence presented to and reviewed by the committee. (J.A. 23-24) The regulatory scheme also restricts the power of the prison administrator. Although it allows the prison administrator to affirm or reverse the recommendation of the program commtitee, or to remand it to the committee for further consideration (J.A. 24), it does not allow him to change the findings. This restriction that limits the power of the prison administrator was adopted by the department of social services and approved by the state attorney general and state governor.

The regulatory scheme thus creates an expectation that prisoners will not be transferred to Mainland prisons without good cause. The classification process "never inflicts punishment" but seeks to classify prisoners "in the best interests of the individual, the State, and the system." (J.A. 20) The rules provide for a hearing only for transfers involving "a grevious loss" which is "a serious loss to a reasonable man." (J.A. 21)

A reclassification must be in the best interests of the individual, the State, and the community. The regulatory scheme clearly contemplates a fair hearing for a prisoner who is faced with the risk of a serious loss. The purpose of the hearing is to ensure that before a serious loss is inflicted on a prisoner that it is indeed in the best interests of the individual, the State, and the community. Whether this scheme requires a factual or a predictive finding, it creates an expectation that is entitled to some

constitutional protection. *See Greenholtz v. Nebraska Penal Inmates*, 442 U.S. at 12.

Respondent's transfer from Hawaii to California was a serious loss. It would be a serious loss to any reasonable man. It separates him from his family, friends and lawyers by at least two thousand miles of Pacific Ocean. (J.A. 26) It places him in an alien environment. It denies him meaningful access to the Hawaii courts and corrections agencies. It isolates him at least as much as extended segregation for punishment. *Cf. Wolff v. McDonnell*, 418 U.S. at 572 n. 19; *Tai v. Thompson*, 387 F. Supp. 912, 915 (D.C. Haw. 1975). In Respondent's case, the interstate transfer could isolate him for the rest of his life.

Any reasonable man faced with isolation for the rest of his life would think that a serious loss. And any reasonable man reading the Hawaii regulatory scheme as a whole would think the transfer of a prisoner to the Mainland was treated as a serious loss. Rule V provides that a prisoner may retain a lawyer in only four specific situations, one of which is a classification hearing for a potential interstate transfer. When a prison official tells a prisoner he is entitled to a lawyer, a reasonable prisoner believes the risk of a serious loss is involved.

Lono v. Ariyoshi, 63 Haw. 138, 621 P.2d 976 (1981), on which the Petitioners rely, is not controlling on the issue of whether Hawaii regulations create a liberty interest. The Supreme Court of Hawaii may authoritatively construe Hawai statutes and regulations, but "[i]n cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function." *Crowell v. Benson*, 285 U.S. 22, 60 (1932). In this regard this Court has made independent judgments in reviewing state court findings in cases involving the Contract Clause, *e.g. Irving Trust v. Day*, 314 U.S. 556, 561

(1942), *Appleby v. New York*, 271 U.S. 364 (1925); *Municipal Investors v. Birmingham*, 316 U.S. 153 (1942); in cases involving state created rights under the Full Faith and Credit Clause, *e.g. Adam v. Saenger*, 303 U.S. 59 (1938); in cases involving the Due Process Clause, *e.g. Brown v. Louisiana*, 383 U.S. 131 (1966); *Evans v. Newton*, 382 U.S. 296 (1966); *Logan v. Zimmerman Brush Co.*, _____ U.S. _____, 102 S.Ct. 1148 (1982); and in cases involving the Compact Clause *e.g. West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951).

Moreover, the court in *Lono* never considered, discussed, or even cited *Vitek v. Jones* or *Greenholtz v. Nebraska Penal Inmates*, although those cases had been decided. In *Lono* the court only considered, and briefly at that, one paragraph of the state's regulatory scheme. It did not consider that the scheme defines transfers in terms of a grevious loss. It did not consider the classification committee's obligation to make factual findings to support its recommendations, or the restrictions on the power of the prison administrator to change those findings. It did not discuss at all the differing consequences that flow from interstate and intrastate transfers.

In this case, however, there really is no dispute about the meaning of any regulation. The question is simply whether the regulatory scheme creates a liberty interest under the federal constitution, as the Court of Appeals recognized, that is preeminently a federal question. In *Logan v. Zimmerman Brush*, this Court reviewed an Illinois Supreme Court opinion in light of the Due Process Clause. The case arose under the Illinois Fair Employment Practices Act that prohibited discrimination against the physically handicapped. The Act required an administrative hearing before a commission within 120 days after a complaint was filed. The commission set the hearing 5 days after the limitations period expired. The Illinois court held that the Commission was without jurisdiction for failure to comply with limitations period. This Court noted that:

> The Illinois Supreme Court . . . seemed to believe that no individual entitlement could come into being under the FEPA until the Commission took appropriate action within the statutory deadline. Because the entitlement arises from statute, the court reasoned, it was the legislature's prerogative to establish the "procedures to be followed upon a charge." *Logan v. Zimmerman*, 102 S.Ct. at 1155.

The Illinois court held that no substantive right came into being unless the 120-day rule was complied with. This Court rejected that view.

> The 120-day limitation in the FEPA, . . . of course, involves no such thing. It is a procedural limitation on the claimant's ability to assert his rights, not a substantive element of the FEPA claim. Because the state scheme has deprived Logan of a property right, then we turn to the determination of what process is due to him. *Logan v. Zimmerman Brush*, 102 S.Ct. at 1156.

Thus, in *Logan* this Court decided that the Illinois statute created a property right even though the Illinois Supreme Court had held that it did not create a property right. In this case, as in *Logan*, this Court is in no way bound by the state's court's decision on the issue of whether the regulation creates an interest protected by due process.

Meachum v. Fano, 427 U.S. 215 (1976) and *Montanye v. Haymes*, 427 U.S. 236, 242 (1976), also relied on by Petitioners, are inapposite. In neither of those cases was there any regulation or practice which gave rise to a reasonable expectation that the prisoners would not be transferred from one prison to another within the same state without good cause. Hence there was no state-created liberty interest in those cases.

On the other hand, because of Hawaii's detailed regulatory scheme this case is like *Vitek v. Jones*. There this Court found that a Nebraska statute authorizing the transfer of a prisoner to a

mental institution upon a physician's or psychologist's finding that the prisoner suffered from a mental disease or defect which could not be properly treated in prison created a liberty interest in not being transferred to a mental institution, in spite of the fact that the statute clearly authorized the prison administrator "to designate any available, suitable and appropriate residence facility or institution as a place of confinement for any state prisoner and to transfer a prisoner from one place of confinement to another." *Vitek v. Jones*, 455 U.S. at 483. Here the detailed regulations surrounding interstate transfer of prisoners limit the discretion of the Hawaii administrator just as the Nebraska statute limited the discretion of the Nebraska administrator. No principled distinction can be drawn. If the statute in Nebraska created a liberty interest so does the Hawaii regulatory scheme, and Respondent must be afforded due process before he can be transferred to a Mainland prison.

II. INDEPENDENT OF THE STATE REGULATORY SCHEME AND PRACTICE, RESPONDENT RETAINED A RESIDUUM OF LIBERTY THAT WOULD BE INFRINGED BY A TRANSFER TO A MAINLAND PRISON WITHOUT COMPLYING WITH THE MINIMUM REQUIREMENTS OF DUE PROCESS.

Independent of the Hawaii regulatory scheme and practice, Respondent retained, even after his conviction and sentence, a "residuum of liberty" that would be infringed by a transfer to a Mainland prison "without complying with minimum requirements of due process." *Vitek v. Jones*, 455 U.S. 480, 491 (1980). Here the loss of liberty caused by the transfer to a Mainland prison is qualitatively different from the loss involved in an intrastate transfer. If an ordinary citizen were banished from his home state, there is no question "that protected liberty

interest would be unconstitutionally infringed absent compliance required by the Due Process Clause." *Vitek v. Jones,* 455 U.S. at 492. Banishment or transportation has always been considered a form of punishment in its own right which involves a grevious loss of liberty. In his dissenting opinion in *United States v. Ju Toy,* 198 U.S. 253, 269-71 (1905) Justice Brewer wrote:

> By all the authorities the banishment of a citizen is punishment, and punishment of the severest kind.
>
> * * *
>
> The forcible removal of a citizen from his country is spoken of as banishment, exile, deportation, relegation or transportation, but by whatever name called it is always considered a punishment. In Black's Law Dictionary "banishment" is defined as "a punishment inflicted upon criminals, by compelling them to quit a city, place, or country, for a specific period of time, or for life. It is inflicted principally upon political offenders, 'transportation' being the word used to express a similar punishment of ordinary criminals." The same author defines "exile" as banishment, and "transportation" as "a species of punishment consisting in removing the criminal from his own country to another (usually a penal colony), there to remain in exile for a prescribed period." In Rapalje & Lawrence's Law Dictionary (vol. 1, page 109), "banishment" is called: "A punishment by forced exile, either for years or for life; inflicted principally upon political offenders, 'transportation' being the word used to express a similar punishment of ordinary criminals." In 4 Bl. Com. 377 it is said: "Some punishments consist in exile or banishment, by abjuration of the realm, or transportation." Vattel Book 1, Sec. 228, declares: "As a man may be deprived of any right whatsoever by way of punishment — exile, which deprives him of the right of dwelling in a certain place, may be inflicted as a punishment; banishment is always one; for, a mark of infamy cannot be set on any one, but with a view of punishing him for a fault, either real or pretended."

> President Madison, in his report on the Virginia resolutions concerning the alien and sedition laws, said (4 Elliott's Debates, 455), referring to the possibilities which attend a removal from the country, "if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied."
>
> The twelfth section of the English Habeas Corpus Act, 31 Car. II, one of the three great muniments of English liberty, enacted "that no subject of this realm, that now is or hereafter shall be an inhabitant or resident of this kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, shall or may be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands, or places beyond the seas, which are or at any time hereafter shall be within or without the dominions of his majesty, his heirs or successors; and that every such imprisonment is hereby enacted and adjudged to be illegal . . . .

See also Fong Tue Ting v. United States, 149 U.S. 698, 709 (1893); *Cooper v. Telfair*, 4 Dall. 14 (1800).

Respondent's transportation to a Mainland prison involves substantial changes in the conditions of confinement beyond those justified by his sentence. He is physically separated by at least two thousand miles of ocean from his family, friends, and lawyer in Hawaii, for perhaps the rest of his life. As a Native Hawaiian, Respondent is physically separated from his whole culture, and he is denied access to personnel who are trained to understand the unique problems of Native Hawaiians.* Re-

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*For a discussion of the unique problems of Native Hawaiians, *see generally* 85 Congr. Rec., H.R., 1st Sess., 14703, 3/27/57, a speech by the late Governor John Burns, then Delegate to Congress; Pukui, Haertig, & Lee, *NANA I KE KUMU*, Vols. I & II (Queen Liliuokalanix Children's Center Publication) (a manual for social workers and others interested in Hawaiian culture); *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, 588 F.2d 1216 (9th Cir. 1978), (includes a discussion of a trust obligation imposed on Hawaii in providing benefits to Native Hawaiians).

spondent's isolation is nearly complete. As a Native Hawaiian he is placed in a prison system in which he is characterized among the ethnic groups of Caucasian, Black, and Hispanic, as "other."

Furthermore, Respondent was stigmatized by the corrections officials that effected his transfer as the "most dangerous and assaultive prisoner in the Hawaii prison system." (J.A. 27) He must bear the burden of that label throughout the remainder of his life in an alien prison environment. The burden of that label is substantial. It affects his relationships with other prisoners and with prison personnel. Despite his exemplary conduct, at least up to January 1974, this label will always be a negative factor in his record.

The consequences visited upon Respondent Wakinekona by his banishment from Hawaii and his transportation to a Mainland prison constitute "the kind of deprivations of liberty that requires procedural protections." *Vitek v. Jones*, 455 U.S. at 494. Certainly he had the right to a neutral factfinder. His complaint alleging that the factfinder was biased and prejudiced should not have been dismissed for failure to state a claim upon which relief may be granted.

CONCLUSION

By self-imposed rules and practice, Hawaii corrections officials chose to create a reasonable expectation that prisoners would not be transferred to a Mainland prison without good cause. Further, prisoners who are transferred from Hawaii to the Mainland suffer a substantial change in the conditions of their confinement. For both these reasons, Respondent has a liberty interest that is protected by the Due Process Clause. For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed and this cause remanded to the United States District Court for further pretrial proceedings and trial.

Respectfully submitted,

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